In the
Supreme Court of the United States
OCTOBER TERM, 1956

No. 329

DISTRICT COURT OF CREEK COUNTY, OKLAHOMA, and HONORABLE KENNETH HUGHES, the Judge Thereof,
Petitioners,

VERSUS

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Respondent.

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

OPINION BELOW

The opinion of the Supreme Court of Oklahoma sought to be reviewed is reported in — Okla. —, 298 P.2d 427. That opinion was entered on April 3, 1956, and the petition for rehearing was denied on May 22, 1956.

II.

JURISDICTION

Apparently, petitioner seeks to invoke the jurisdiction of this Court by contending that the reported case involves a question of the denial by the Supreme Court of

Oklahoma of petitioners' "title, right, privilege or immunity * * * claimed under the constitution, treaties or statutes of * * * the United States." 28 U.S.C., Section 1257(3).

Petitioners' first contention is that this Court should set up a single "federal standard" to be followed by all state courts in applying the doctrine of *forum non conveniens*.

It is further contended that this Court should blueprint and set out in detail under what specific circumstances a state court may dismiss a Federal Employers' Liability Act action on the ground of *forum non conveniens* and finally petitioners contend that it was improper for the Supreme Court of Oklahoma to overrule the trial court where the nominal party plaintiff (being one of the attorneys for himself) was a resident of the forum state.

III.

QUESTIONS PRESENTED

(1) Should this Court set up a binding single standard to be followed by all state courts in applying the doctrine of *forum non conveniens*, thereby denying to the state courts the right to exercise any discretion in the matter?

(2) Can a non-resident attorney, representing a non-resident real party in interest, defeat and nullify the doctrine of *forum non conveniens* which has been accepted by the State of Oklahoma through the transparent expediency of joining a resident attorney as co-counsel and arranging for that attorney's appointment as administrator of the estate of the non-resident decedent?

IV.

SUMMARY OF ARGUMENT

Respondent's contention is that the decision of the Supreme Court of Oklahoma is clearly in accord with the decision of this Court in *Missouri ex rel Southern Railway Company* v. *Mayfield* (1950), 340 U.S. 1. In that opinion this Court emphatically pointed out that so long as a state makes no discrimination against Federal Employers' Liability Act suits and makes no discrimination against citizens of other states, it is free to accept or reject the doctrine of *forum non conveniens*. In the same case this Court held that if a state chose to accept the doctrine it was then free to enforce the same according to its own local law. Under such circumstances, this Court held that once a state has chosen to accept or reject the doctrine, the question then becomes one of state law which is not open to review by this Court.

In its prior opinion in the case of *St. Louis-San Francisco Railway Company* v. *Superior Court, Creek County* (Okla., 1954), — Okla. —, 290 P.2d 118, the Supreme Court of Oklahoma, in accepting and enforcing the doctrine of *forum non conveniens*, made it abundantly clear that in so doing, Oklahoma was not, and had no intention of, discriminating against non-residents. In fact, the Supreme Court of Oklahoma in that decision went further by holding that even if the plaintiff in that action had been a citizen and resident of Oklahoma, that fact alone would not convert Oklahoma into an appropriate and convenient forum. We invite this Court's attention to the following

excerpt from the opinion in *St. Louis-San Francisco Railway Company* v. *Superior Court, Creek County, supra*:

> "Nor does the fact that plaintiff Murphey, since the institution of this action, has become a citizen and resident of this state (if in fact he has) convert this state into an appropriate and convenient forum. *Mich. C. R. Co.* v. *Mix*, 278 U.S. 492, 49 Sup. Ct. 207; *Giles* v. *Western Airlines*, 73 F. Supp. 616."

Having announced the foregoing rule in its opinion on the subject of *forum non conveniens*, the present petitioners could hardly expect the Supreme Court of Oklahoma to do a complete about face and allow the doctrine to be nullified and mocked by a legalistic slight of hand performance whereby the appointment of a Creek County, Oklahoma, attorney as administrator of the estate of a deceased resident and citizen of New Mexico is engineered by an attorney residing and practising in Minnesota.

V.

ARGUMENT

The cause of action in this case arose on July 5, 1955, when Vernon F. Adair, employed by defendant as a head brakeman, was killed in a train wreck in New Mexico. At the time of his death Adair was a citizen of New Mexico, residing at Clovis, New Mexico. He was survived by his wife and minor children, all of whom lived in Clovis, New Mexico. On July 18, 1955, just thirteen days after the fatal accident, Mr. Joe Moore, an attorney of Creek County, Oklahoma, was appointed administrator of Adair's estate

by the County Court of Creek County, Oklahoma. On the same day this case was filed by the said Joe Moore as such administrator in the District Court of Creek County, Oklahoma. The attorneys of record for the plaintiff were, in addition to Mr. Moore himself, Mr. William H. De Parcq of Minneapolis, Minnesota, and Mr. Pat Malloy of Tulsa, Oklahoma. A Mr. Charles Alan Wright of Austin, Texas, also appeared on the brief for plaintiff when the defendant railway company applied to the Supreme Court of Oklahoma for a writ of mandamus against the District Court of Creek County.

The trial court overruled a motion to dismiss on the ground of *forum non conveniens* and thereupon this respondent filed its application with the Supreme Court of Oklahoma, praying that Court to assume original jurisdiction and to grant a writ of mandamus requiring the District Court of Creek County to dismiss the action. The Supreme Court of Oklahoma, after reviewing the record made in the trial court and after considering briefs submitted by petitioners and respondent, held that the lower court's refusal to dismiss the action was an abuse of discretion. The writ of mandamus was granted.

In its opinion granting the writ of mandamus the Supreme Court of Oklahoma reviewed its previous decision and pointed out that:

> "The circumstances of the (this) case seem to be even more compelling toward the application of *forum non conveniens* than were those involved in the case of *St. Louis-San Francisco Railway Company* against

Superior Court, Creek County (Okla.), 290 Pac. 2d 118."

In disposing of the present petitioners' contention that Joe Moore was the real party in interest and therefore had an absolute right to bring the action in Oklahoma, the Supreme Court of Oklahoma cited and called particular attention to the reported case of *Giles* v. *Western Air Lines, Inc.*, 73 F. Supp. 616. In that case a Federal Court in Mr. De Parcq's home state of Minnesota refused to allow him to maintain exactly the type of case he sought to prosecute in Oklahoma in the instant case. The printed opinion in *Giles* v. *Western Air Lines, Inc., supra*, reflects that Mr. De Parcq represented the plaintiff in that case just as he does in this one. The Supreme Court of Oklahoma called attention to the fact that the only difference between the *Giles* case, *supra*, and the instant case is that in the *Giles* case plaintiff's attorney engineered the appointment of one of his employees as administratrix, whereas in the case at bar he engineered the appointment of an attorney of Creek County, Oklahoma, as administrator. The record from the Creek County Court shows that Mr. Moore acted throughout in the dual capacity of dummy administrator and local counsel. This method of shopping for venue was very obvious from the record before the Supreme Court of Oklahoma, and in commenting thereon in its opinion in this case, that Court stated:

"The principal difference between the cited case and the one here involved is that in that case the administratrix was an employee of one of the attorneys in the case, whereas here the administrator is himself one

of the attorneys in the case. We fail to see how such difference could possibly have any material effect upon the outcome, however.

"It should be apparent from a reading of the previous opinions of this and other courts that the principal purpose of the adoption of the doctrine of *forum non conveniens* was to attempt to stop the wholesale indiscriminate importation of foreign causes of action into this jurisdiction. If this court were to hold that the application of the doctrine could be avoided in death cases by the simple expedient of procuring the appointment of a resident administrator to bring the action, we would in effect be opening wide the doors of the courts of this state and extending an invitation to prospective litigants everywhere to bring their litigation here without fear of dismissal, and the doctrine of *forum non conveniens* would thereby be rendered completely ineffective. This we decline to do."

In its opinion in this case the Supreme Court of Oklahoma likewise called attention to the fact that after the railway company filed its motion to dismiss in the trial court in Creek County, Oklahoma, the nominal plaintiff, Joe Moore, filed this same action in the Circuit Court of Cook County, Illinois. To our minds this action on the part of the plaintiff and his co-counsel was a tacit admission that in view of the previous decision by the Supreme Court of Oklahoma in *St. Louis-San Francisco Railway Company* v. *Superior Court, Creek County, supra,* this case could not be maintained in Oklahoma.

CONCLUSION

This Court, in *Missouri* v. *Mayfield, supra,* held that a state court "should be free to decide the availability of the principle of *forum non conveniens,* * * * according to its own local law." And, "whether a state makes such a choice is like its acceptance or rejection of the doctrine of *forum non conveniens,* a question of state law not open to review * * *."

The Supreme Court of Oklahoma made its decision to adopt and accept the doctrine when it rendered its opinion on July 13, 1954, in the case of *St. Louis-San Francisco Railway Company* v. *Superior Court, Creek County, supra.* Counsel for petitioners in the instant case were fully cognizant of that decision when, on July 18, 1955, they filed the present case in the same county. In the instant case the Supreme Court of Oklahoma has merely refused to allow the present petitioners to avoid the application of the doctrine "by the simple expedient of procuring the appointment of a resident administrator to bring the action" which "would in effect be opening wide the doors of the courts of this state and extending an invitation to prospective litigants everywhere to bring their litigation here without fear of dismissal * * *."

In ordering a dismissal of this case the action of the Supreme Court of Oklahoma is in accord with the decision of this Court in *Missouri* v. *Mayfield, supra.* Oklahoma has adopted the doctrine of *forum non conveniens* and is therefore free to enforce that doctrine according to its own local law.

It is, therefore, submitted that the question is not open for review by this Court and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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